Supreme Court, U.S.
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No. 95-320

In The

Supreme Court of the United States

October Term, 1995

GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION, IN BANKRUPTCY,

Petitioners,

v.

PHILIP WAGNER and WILLIAM SIMON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION OF RESPONDENT PHILIP WAGNER TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. BASIS FOR JURISDICTION 1

II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

A. Introduction 1

B. The Excuse Offered By Petitioner Eckert Did Not Satisfy *Any* Standard For Leave to File A Late Appeal 3

C. The Thirty Day Time Period Within Which To File An Appeal Is Uniformly Applied As A Rigid, Strictly Construed *Jurisdictional* Requirement; Petitioners' Argument Would Eviscerate F.R.A.P. 4(a)(1), Essentially Converting It Into A Sixty Day Rule 5

D. F.R.A.P. Rule 4(a)(5) Permits the District Court to Exercise Its Discretion In Determining Whether To Allow a Late Appeal, And The Language of the Rule Does Not *Require* The Court to Utilize Both Good Cause *and* Excusable Neglect In Considering Such An Application 9

E. There Is No Conflict Among the Circuit Courts of Appeal As To Application Of The "Excusable Neglect" Standard To Motions For Leave To File a Late Appeal Filed After Expiration of the Initial Thirty Day Period Within Which To Appeal 10

F. Certiorari Should Not Be Granted Because The Ninth Circuit Was Without Jurisdiction to Hear the Underlying Appeal, As the District Court Extended Petitioners' Time to Appeal Beyond the Time Provided In F.R.A.P. 4(a)(5) 18

III. CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

650 Park Ave. Corp. v. McRae, 836 F.2d 764 (2d Cir. 1988) 5

Allied Steel v. City of Abilene, 909 F.2d 139 (5th Cir. 1990) 6, 7

Borio v. Coastal Marine Constr. Co., 881 F.2d 1053 (11th Cir. 1989) 6

Browder v. Department of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed. 521 (1978) 5

Buggs v. Elgin, Joliet & Eastern Railroad, 852 F.2d 318 (7th Cir. 1988) 16

Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988) 6

Cyrak v. Lemon, 919 F.2d 320 (5th Cir. 1990) 13, 14

In Re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985) 6

Lorenzen v. Exp. Ret. Plan of Sperry & Hutchinson, 896 F.2d 228 (7th Cir. 1990) 7

Olson v. National Broadcasting Co., Inc. 855 F.2d 1446 (9th Cir. 1988) 17

Oregon v. Champion Int'l Corp., 680 F.2d 1300 (9th Cir. 1982) 6, 10, 17

Parke-Chapley Const. Co. v. Cherrington, 865 F.2d 907 (7th Cir. 1989) 6, 11

Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991) 17

TABLE OF AUTHORITIES – Continued

Page

Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, ___ U.S.___, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) 2

Pontarelli v. Stone 930 F.2d 104 (1st Cir. 1991).....12, 17

Pratt v. McCarthy, 850 F.2d 590 (9th Cir. 1988)..... 16

Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983) 15

Redfield v. Continental Casualty Co., 818 F.2d 596 (7th Cir. 1987)..... 6

Scarpa v. Murphy 782 F.2d 300 (1st Cir. 1986) 11, 12, 16, 17

U.S. v. Twomey, 845 F.2d 1132 (1st Cir. 1988) 7, 16

Vogelsang v. Patterson Dental Co., 904 F.2d 427 (8th Cir. 1990) 6

Weekley v. Jones, 927 F.2d 382 (8th Cir. 1991) 13, 14

STATUTES:

Federal Rules of Appellate Procedure Rule 3(c)..... 4

Federal Rules of Appellate Procedure Rule 41(a) 3, 15, 18

Federal Rules of Appellate Procedure Rule 4(a)(1) *passim*

Federal Rules of Appellate Procedure Rule 4(a)(3) 14, 15

Federal Rules of Appellate Procedure Rule 4(a)(5) *passim*

Federal Rules of Appellate Procedure Rule 4(b) 16

Federal Rules of Civil Procedure Rule 26(b)..... 6

Federal Rules of Civil Procedure Rule 60(b)..... 16

I. BASIS FOR JURISDICTION

Petitioner contends jurisdiction in this Court is conferred by United States Supreme Court Rule 10.1(a), based on a conflict among the United States Circuit Courts of Appeals on the subject matter of the decision of the Ninth Circuit Court of Appeals in this matter. Respondent respectfully submits there is no conflict among the Courts of Appeals regarding the subject matter of the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. Introduction

Respondent Philip Wagner ("Respondent") hereby opposes the Petition for Writ of Certiorari submitted by Petitioners Grant Reynolds ("Reynolds") and the Estate of Dale C. Eckert Corporation ("Eckert") (collectively "Petitioners") with respect to the May 26, 1995 decision by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit remanded this matter to the United States District Court for the Central District of California, Hon. Gary S. Taylor, for a determination as to whether Petitioners demonstrated "excusable neglect" pursuant to Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(5), satisfying the standard required in order to obtain leave to file a late appeal to the Circuit Court of Appeals, on a motion filed *after* expiration of the initial jurisdictional thirty-day period of time within which to file an appeal under F.R.A.P. Rule 4(a)(1).

Following the District Court's entry of summary judgment in favor of Respondent against Petitioners, Petitioners failed to appeal within thirty days. Eckert thereafter moved for leave to file a late appeal, the Court granted Eckert's motion, and the Ninth Circuit denied Respondents' motions to dismiss the appeal for lack of jurisdiction, but granted reconsideration to the extent the jurisdictional issue was referred to the panel hearing the appeal. Thereafter, the Ninth Circuit considered the jurisdictional issue first, and remanded the case back to the District Court in order to determine whether Petitioners met the standard of "excusable neglect" set forth in this Court's decision in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Petitioners' motion for reconsideration and suggestion for rehearing *en banc* were denied. Prior to the District Court's hearing on remand, Petitioners filed their Petition for Writ of Certiorari to this Court, arguing the Ninth Circuit's order to consider only the "excusable neglect" standard conflicted with F.R.A.P. Rule 4(a)(5) and the decisional law of six other Circuit Courts.

Careful reading of the cases cited by Petitioners, however, reveals there is *no* such conflict among the circuits, and the law remains clear that motions for leave to file a late appeal submitted *after* expiration of the initial thirty-day period within which to appeal require a showing of "excusable neglect", a standard Petitioners failed to satisfy in the Court below. The Petition should be denied.

B. The Excuse Offered By Petitioner Eckert Did Not Satisfy *Any* Standard For Leave to File A Late Appeal

The District Court granted summary judgment in favor of Respondents herein on September 1, 1993. The time period under F.R.A.P. Rule 4(a) for filing a timely notice of appeal expired on October 1, 1993. No notice of appeal or motion for enlargement of time was filed within that time period. Instead, three days *after* the initial thirty-day period of time within which to appeal expired, Petitioner Eckert moved for leave to file a late appeal. Petitioner Eckert's motion was based solely on its purported showing of "good cause", on the grounds counsel had been unable to schedule a meeting with the Eckert Bankruptcy Trustee and his counsel to "obtain his instruction regarding appeal", and thus was unsure whether to proceed with the appeal. "Counsel gave no reason for his inability to meet with the trustee; instead, he stated simply that '[a]lthough both [counsel for the trustee] and I have tried to make contact on several occasions, to this date we have been unable to schedule a meeting wherein he and I could meet with the trustee and obtain his instruction regarding appeal.' " (Decision of the Ninth Circuit Court of Appeals, page 5780.) The motion, made on October 4, 1993, acknowledged the Decision granting Summary Judgment had been transmitted to the Trustee on *August* 26, 1993. The time to appeal from the September 1, 1993 Judgment expired on *October* 1, 1993. Without explanation, the District Court granted Eckert additional time to file its appeal.

Eckert's motion made no mention of *any* excuse for the delayed appeal by Petitioner *Reynolds* (nor did the

subsequent Notice of Appeal purport to constitute an appeal on behalf of Reynolds, although the Ninth Circuit found that because Reynolds was referred to in the caption of the case, he had satisfied F.R.A.P. Rule 3(c)). Reynolds has never offered *any* explanation for tardiness in the filing of his appeal.

Respondents opposed the motion for extension of time to file an appeal, arguing Petitioner Eckert had failed to demonstrate "excusable neglect" for the late appeal. The District Court granted the motion in a minute order which did not specify whether it was based on "good cause" or "excusable neglect", and the Court extended the time for Petitioners to appeal to November 15, 1993, by order dated October 28, 1993. A Notice of Appeal indicating that "Plaintiff Estate of Dale C. Eckert Corporation, above named, hereby appeals" was filed on November 15, 1993.

There is *no* authority which supports granting a motion for leave to file a late appeal filed after the initial thirty-day period simply because the Appellant, with knowledge of the decision to be appealed, has been unable to schedule a meeting with counsel within the first thirty days to discuss the appeal, and is still unsure *after* the thirty days whether to appeal at all. Respondents contended in the District Court and in the Ninth Circuit that the purported justification offered in this case for failing to file a notice of appeal within thirty days after entry of judgment satisfied neither the "excusable neglect" standard, *nor* the "good cause" standard.

C. The Thirty-Day Time Period Within Which To File An Appeal Is Uniformly Applied As A Rigid, Strictly Construed *Jurisdictional* Requirement; Petitioners' Argument Would Eviscerate F.R.A.P. 4(a)(1), Essentially Converting It Into A Sixty-Day Rule

F.R.A.P. 4(a)(1) provides that a "notice of appeal *shall* be filed within 30 days after the date of entry of the judgment . . . appealed from." (emphasis added).

> "The requirement of a timely notice of appeal is 'mandatory and jurisdictional.' "

Browder v. Department of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 54 L.Ed. 521 (1978).

> "The purpose of the timeliness requirements of Rule 4(a)(1) . . . , 'is to provide a definite point at which, in the absence of a notice of appeal, litigation will come to a close.' Thus, 'the requirements of [Rule] 4(a)(1) and its predecessors with respect to the time for taking an appeal have long been treated as especially *rigid*.' "

650 Park Ave. Corp. v. McRae, 836 F.2d 764, 766 (2d Cir. 1988) (citations omitted) (emphasis added).

F.R.A.P. 4(a)(5) provides for an *exception* to this rule, which the District Court may, in its discretion, decide to apply, under the appropriate circumstances, as follows:

> "[t]he district court, upon a showing of excusable neglect or good cause, *may* extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)."

F.R.A.P. 4(a)(5) (emphasis added).

Rule 4(a)(5) was amended in 1979 to include the "or good cause" language. The Advisory Committee Notes on Rule 4(a)(5) provide, in relevant part, as follows:

> "The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a 'showing of excusable neglect.' While this was an appropriate standard in cases in which the motion is made *after* the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case 'good cause,' which is the standard that it is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate."

F.R.A.P. 4(a)(5) (Advisory Committee Notes).

The overwhelming majority of Circuit Courts of Appeal have adopted this standard in holding that if a party fails to bring a motion for extension of time to file a notice of appeal within thirty days following entry of judgment, the "good cause" standard will not apply, and the higher "excusable neglect" standard will apply. *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *Redfield v. Continental Casualty Co.*, 818 F.2d 596, 601 (7th Cir. 1987); *In Re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 514 (2d Cir), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985); *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 909-910 (7th Cir. 1989); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143, n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 918 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988). *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990); *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055

(11th Cir. 1989); *U.S. v. Twomey*, 845 F.2d 1132, 1134 (1st Cir. 1988).

> "A strict construction of Rule 4(a)(1) necessarily and logically compels us to erect a high threshold in our determination of 'excusable neglect' under Rule 4(a)(5). . . . Loosely interpreting 'excusable neglect' would convert the thirty-day period for appeal provided in F.R.A.P. 4(a) into a 60-day one – a result clearly not intended by the Rule's framers. [Citations to *Parke*]."

Allied Steel v. City of Abilene, 909 F.2d at 143 (5th Cir. 1990).

> "Rule 4(a)(5) clearly indicates that potential appellants may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options."

Id. at 143.

Appellants appear to cite *Lorenzen v. Exp. Ret. Plan of Sperry & Hutchinson*, 896 F.2d 228 (7th Cir. 1990) for the proposition that there is little difference between the "good cause" and the "excusable neglect" standards. (Petition for Certiorari, page 18). This interpretation, however, is incorrect. The Seventh Circuit expressly held that the 'good cause' standard is limited to requests for extensions filed within the original time period for filing the appeal. Otherwise, the correct standard is "excusable neglect", which is in accord with the Advisory Committee's description of the framer's intent in drafting the amendment to F.R.A.P. 4(a)(5). *Id.* at 231. The language

Appellants did *not* cite is more helpful to this analysis than what Appellants *did* quote from *Lorenzen*:

> "[I]t is too soon to reexamine Cherrington [*Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989) which stands for the proposition that 'good cause' standard applies only during the first thirty days following entry of judgment], especially when its position is that of a majority of the circuits to have ruled on the question. And in defense of that position we point out that when the time for taking an appeal has passed without a peep from the losing party, the winner's interest in finality and repose is greater than if within that time a document is filed indicating that the loser wants to appeal. . . . But it should not require thirty days to decide whether one has a non-frivolous ground for appeal. The exotic excuses for failing to file a timely appeal – mistake of law (as here) and the like – come into play only when the notice has not been filed within the 30 days. All the interesting cases, therefore, will arise under the excusable neglect standard. Perhaps all the cases, period. There are no reported decisions of the meaning of 'good cause' in Rule 4(a)(5)."

Id. at 232.

Here, according to Eckert's motion, Petitioners had not even *conferred* about the appeal as of thirty-three days *after* entry of judgment, beyond the F.R.A.P 4(a)(1) thirty-day jurisdictional period. As Repondents argued in the Ninth Circuit, under any accepted interpretation of the Rule, Petitioners did not qualify for more time to file their appeal.

D. F.R.A.P. Rule 4(a)(5) Permits the District Court to Exercise Its Discretion In Determining Whether To Allow a Late Appeal, And The Language of the Rule Does Not *Require* The Court to Utilize Both Good Cause *and* Excusable Neglect In Considering Such An Application

Rule 4(a)(5) provides that the Court *may* consider such an application for extension of time to file a notice of appeal, and provides that, when it does, it *may* use a standard of excusable neglect or good cause. That is precisely what the District Courts have uniformly done. Using the full extent of the discretion provided by the Rule, the District Courts have applied the "good cause" standard when application is filed within the *first* thirty days, and the "excusable neglect" standard when the application is filed *after* expiration of the time period.

Petitioners argue that this violates the clear import of the Rule. However, the clear import of the Rule is found in the Committee's notes, which, while they support Respondents' views on the correct standard to apply after the time to appeal has expired, Petitioners ask this Court to ignore because the language of the Rule is purportedly not ambiguous. To be sure, the Circuit Courts, interpreting the Rule, have applied standards which meet the needs of F.R.A.P. 4(a)(1)'s jurisdictional requirements, designed to ensure finality in litigation, and the fact that only in extraordinary circumstances are parties to be permitted to appeal after the jurisdictional time period has expired. Petitioners are arguing that appellants may

allow the initial thirty-day time period to expire, and jurisdiction in the Circuit Court with it, and blithely move for leave to appeal thereafter, offering merely "good cause".

The Circuit Courts have, within the discretion permitted in the Rule, distinguished between pre-expiration and post-expiration motions. The language of the Rule does not proscribe use of that discretion, nor does the language of the Rule *mandate* that the District Court consider "good cause" after thirty days has expired. It is not a clear abuse of discretion, in light of the strict jurisdictional requirements of F.R.A.P. 4(a)(1), for a Court to utilize "excusable neglect" as the standard for considering a motion for leave to file a late appeal filed after expiration of the initial thirty-day period, particularly where there are facts suggesting no good reason for extending the time to appeal.

E. There Is No Conflict Among the Circuit Courts of Appeal As To Application Of The "Excusable Neglect" Standard To Motions For Leave To File a Late Appeal Filed After Expiration of the Initial Thirty-Day Period Within Which To Appeal

Petitioners contend there are six Circuit Courts of Appeals which disagree with the decision of the Ninth Circuit in this matter, and with *Oregon v. Champion Int'l Corp., infra.* (Petition, pages 22-26). However, review of the cases cited by Petitioners reveals virtually *no* conflict on the issue at hand.

Arguably, as stated by the Seventh Circuit in *Parke-Chapley Constr. Co. v. Cherrington, supra,* "the only case to reject the ruling in *Champion* ('good cause' standard applies only during the first thirty days following the entry of judgment) is *Scarpa v. Murphy,* [782 F.2d 300 (1st Cir. 1986)] and then only in dicta." 865 F.2d at 909.

In *Scarpa,* counsel for Appellant correctly addressed the notice of appeal and delivered it to the Post Office seven days *before* expiration of the thirty-day period following the entry of judgment. Thus, even though the notice of appeal was received by the Court *after* the thirty-day period had expired, the Appellant acted in a good faith effort to comply with the rule *within* the initial thirty-day period.

The First Circuit held that "There was no mistake by counsel, excusable or otherwise. Rather, there was inexcusable neglect by the Post Office to take more than five days (even though this includes a weekend) to transmit an adequately addressed letter three miles, and no basis for charging counsel for failing to think that more might be needed." *Scarpa,* 782 F.2d at 301. Although the *Scarpa* Court described its analysis as focusing on "good cause" rather than "excusable neglect", in effect, the standard it applied could have been characterized as either.

It was an extreme position to describe counsel's act of mailing the notice of appeal as lacking *any* neglect whatsoever. Delivering the notice of appeal personally to the Clerk of the Court "three miles away" would have guaranteed a timely appeal. However, the Court, in effect, found counsel's minimal "neglect" in choosing to mail the notice "excusable", since it was beyond counsel's

control to expect the Post Office to delay delivery beyond the thirty-day period. Since *Scarpa* involved extraordinarily clear efforts by appellant to appeal *before* expiration of the initial thirty-day time period (and appellant there had taken all the steps necessary to perfect its appeal within the thirty-day period) it is factually distinguishable from all of the other post-thirty-day cases, and should be limited to its facts.

Petitioners have chosen to characterize the *Scarpa* Court's reference to "good cause" as the *rule*, when in fact it is the limited exception. In any event, Petitioners (conceding here they had not even met to discuss the appeal during the first thirty days) cannot argue their circumstances are remotely comparable to the appellant's in *Scarpa*.

Appellants also cite to *Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) for the proposition that there is a "split" in the Circuits as to which standard should apply during the period of time between the expiration of the 4(a) time appeal and sixty days following entry of judgment. *Pontarelli*, like *Scarpa*, is inapposite here, and does not stand for the proposition Petitioners suggest. The District Court in that case entered judgment against several police officers in an employment discrimination action. The officers filed a notice of appeal in a timely fashion, but mistakenly relied on the term *"et al."* in place of naming the individual police officers. The Appellants filed a Motion for Extension of Time to file an appeal, which the District Court denied. The First Circuit held that the failure to name the individual officers was not a result of "excusable neglect" and thus it was not an abuse of discretion

for the District Court to deny the motion for extension of time. The First Circuit in *Pontarelli* noted that:

> "The advisory committee note has been relied upon by the seven regional courts of appeals which adhere to the view that the 'good cause' standard is applicable exclusively to F.R.A.P. 4(a)(5) motions made during the thirty-day period for taking an appeal as a matter of right under F.R.A.P. 4(a)(1). . . . *Scarpa* required circumstances where there was no 'neglect,' excusable or otherwise, on the part of the would-be appellant. Until now, however, we have never been called upon to decide whether a 'good cause' analysis is appropriate as well where the F.R.A.P. 4(a)(5) extension was occasioned only by 'neglect' on the part of the would-be appellant. . . . The advisory committee note, no less than our decision in *Scarpa*, buttresses our reluctance to interpret 'excusable neglect' and 'good cause' as overlapping standards under amended rule 4(a)(5). . . . Where the need for an extension of time to file a notice of appeal results entirely from neglect attributable to the would-be appellant, as distinguished from forces beyond her control, amended rule 4(a)(5) *requires* a showing of 'excusable neglect.' "

Id. at 110-111 (citations omitted) (emphasis added).

Petitioners also incorrectly cite two other cases which purportedly did not follow the majority of the Circuits' interpretation of Rule 4(a)(5), *Weekley v. Jones*, 927 F.2d 382 (8th Cir. 1991) and *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990).

In *Weekley, supra*, a criminal case, the District Court provided no reason from which the Eighth Circuit Court

of Appeals could determine which standard was applied. The case involved a *pro se* defendant, who was in prison, on medication, and suffered borderline mental retardation and paranoid schizophrenia, all factors which the Eighth Circuit found important in its decision. The order denying *habeas corpus* relief was entered on July 11, 1989 and the Appellant filed a request for extension of time to file notice of appeal on August 10, 1989. Thus, Appellant's request was received right on the thirtieth-day following judgment. The Eighth Circuit held that there was at least good cause, and even excusable neglect and there was therefore no reason to find the District Court abused its discretion, regardless of which standard the District Court applied (since the District Court had not specified which standard it had applied). *Id.* at 386. The *pro se* appellant in *Weekley* made every effort to comply with the jurisdictional requirements, despite his shortcomings, and therefore the Court found no abuse of discretion. The decision hardly stands for the proposition either standard is applicable after expiration of the initial thirty-day period.

In *Cyrak v. Lemon, supra,* the Fifth Circuit did not consider the application of F.R.A.P. Rule 4(a)(5) at all, but rather considered whether there was a timely appeal by a co-appellant under Rule 4(a)(3). In *Cyrak,* of three defendants, one filed a timely appeal on April 14, the last day permissible. Another defendant filed a motion to extend the time to file his appeal on May 15, and that motion was granted. When the first appeal was dismissed for lack of prosecution, that defendant and the remaining defendant filed appeals within 14 days after the appellant who obtained leave to file his late appeal. The *Cyrak*

Court was not reviewing the propriety of the District Court's order granting the motion for leave to file a late appeal. Instead, the Court was only asked to dismiss the cross-appeals under F.R.A.P. 4(a)(3), as they were filed well after the 14-day period from April 14, the date of the first appeal. The Circuit Court dismissed the latter appeals as untimely, and also indicated that the "good cause" demonstrated in the District Court by the appellant who sought leave did not inure to the benefit of the other appellants. *Id.* at 324. Since the *Cyrak* Court did not construe the varying standards, the case does not support Petitioners' contention that the Eighth Circuit has departed from the Ninth Circuit's application of F.R.A.P. 4(a)(5).

Pryor v. Marshall, 711 F.2d 63, 65 (6th Cir. 1983) dealt with whether a late notice of appeal could serve as a substitute for a motion for extension of time under Rule 4(a)(5) under the narrow facts of that case, not whether an untimely extension motion could be granted upon a showing of merely "good cause". In fact, the Sixth Circuit in *Pryor* dismissed the appeal for lack of jurisdiction, citing the very same Advisory Committee Notes (discussing the *excusable neglect* standard in F.R.A.P. 4(a)(5)) which Petitioners say cannot be followed:

> "The Notes of the Advisory Committee confirm that the Rule means what it says, and that the 'exception' permitted in Rule 4(a) is the excusable neglect provision of Rule 4(a)(5)."

Id. at 65.

Similarly, *Buggs v. Elgin, Joliet & Eastern Railroad*, 852 F.2d 318 (7th Cir. 1988) is inapposite. In *Buggs*, the appellants, who failed to appeal within thirty days after the original judgment, sought to appeal from an *amended* judgment, entered over *seven months* after the original judgment had been entered. The Seventh Circuit held appellants were attempting to use the grant of a Fed.R.Civ.P. 60(b) motion to circumvent F.R.A.P. Rule 4(a)(1) requiring an appeal within thirty days. In passing, the Court indicated that the appellant's apparent failure to appreciate that the Magistrate's Title VII judgment of October 3 was final, and immediately appealable would not have met the "excusable neglect" *or* "good cause" standards, and was "insufficient as a matter of law to warrant extension of the 30-day rule." *Id.* at 323.

In *Pratt v. McCarthy*, 850 F.2d 590 (9th Cir. 1988), the Court did not even address the "good cause" standard, as the motion for extension of time to file notice of appeal was filed more than thirty days after entry of judgment. The Ninth Circuit found that a misunderstanding between Appellant's attorneys over who would file the appeal did *not* constitute excusable neglect, and dismissed the appeal for lack of jurisdiction.

In *U.S. v. Twomey*, 845 F.2d 1132 (1st Cir. 1988) the First Circuit, in a post-*Scarpa* case, again addressing the Post Office's inexplicable delay in delivering mail in a case eerily similar to *Scarpa*, found that the District Court abused its discretion in denying a criminal appellant's Rule 4(b) motion for extension of time to file an appeal, since Appellant's counsel acted with due diligence, and any neglect was surely excusable, as the notice was mailed well within the thirty-day period but was not

received in a timely fashion due to the post office delay. *Id.* at 1134.

Petitioners also mistakenly contend *Olson v. National Broadcasting Co., Inc.*, 855 F.2d 1446 (9th Cir. 1988) contradicts the Ninth Circuit's *Oregon* decision. *Olson*, however, dealt with the issue of whether a trial court erred in granting additional time to file a notice of appeal when the party seeking the appeal initially filed a motion for extension of time *within* the first thirty days following entry of judgment. *Id.* at 1453-1454.

Indeed, as quoted from *Pontarelli* and *Scarpa* by Petitioners, "the original 'excusable neglect' standard . . . would be pared by gratuitous interpretation if the amendatory 'good cause' analysis were not *confined* to circumstances unsuited to the traditional 'excusable neglect' analysis." (Petition, page 26, citing to *Pontarelli*, at page 110, which in turn cites to *Scarpa*.)

Petitioner's interpretation would require that the two standards not be confined at all, but that the District Court could make *any* determination it wished during the entire sixty-day period beyond the entry of judgment. This is not what Congress intended when drafting the amendment to Rule 4(a)(5) as exhibited by the Committee Notes, nor is it the accepted interpretation of the Rule by the overwhelming majority of Circuit Courts considering the issue.

Petitioners cite *Pearson v. Gatto*, 933 F.2d 521 (7th Cir. 1991) for the proposition that the excusable neglect standard is applied strictly, but fail to acknowledge that *Pearson* is yet another example of a Circuit Court applying *excusable neglect* to a post-thirty-day motion for leave to

file a late appeal. In *Pearson*, the Seventh Circuit found excusable neglect largely because counsel's "overcommitment was due to an excess of public service and altruism, rather than mismanaged ambition or desire for financial gain." *Id.* at 524. There is no issue of altruism or public service here.

The District Court, on remand, should be permitted to determine whether Petitioners demonstrated "excusable neglect" in their motion to file a late appeal.

F. Certiorari Should Not Be Granted Because The Ninth Circuit Was Without Jurisdiction to Hear the Underlying Appeal, As the District Court Extended Petitioners' Time to Appeal Beyond the Time Provided In F.R.A.P. 4(a)(5)

F.R.A.P. Rule 4(a)(5) provides, in pertinent part, as follows:

> "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. ***No such extension shall exceeed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.***"

F.R.A.P. 4(a)(5) (emphasis added).

By order dated *October 28*, 1993, the District Court in this case granted Petitioner the Eckert Estate until *November 15*, 1993, or 75 days after the entry of judgment, to file a notice of appeal. However, that time period exceeded the District Court's authority. The District Court was thus without authority to grant an extension of time beyond November 12, 1993 (taking into account intermediate weekends and legal holidays from the date of the extension order.) The Notice of Appeal on behalf of the Eckert Estate was not filed until November *15*, 1993, exceeding the very latest day to file an appeal by three days. Accordingly, the Ninth Circuit was without subject matter jurisdiction to hear the appeal.

III. CONCLUSION

The Petition at issue involves neither public policy nor significant novel issues of law. Nor does the Petition seek resolution of a bona fide dispute among the Circuit Courts of Appeal. Petitioners have been afforded due process, and must now face whether their tardy actions in bringing this case to appeal met the extraordinary circumstances required to depart from the strict jurisdictional requirements of F.R.A.P. Rule 4(a)(1) that an appeal be made within thirty days. The Petition should be denied, and proceedings on remand permitted to proceed.

Dated: September 28, 1995

Respectfully submitted,

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